

1 KAMALA D. HARRIS
Attorney General of California
2 LINDA SCHNEIDER
Supervising Deputy Attorney General
3 ANTOINETTE B. CINCOTTA
Deputy Attorney General
4 State Bar No. 120482
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2095
7 Facsimile: (619) 645-2061
Attorneys for Complainant

8
9 **BEFORE THE**
BOARD OF PHARMACY
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation and Petition to
12 Revoke Probation Against:

Case No. 4190

13 **UPAS PHARMACY, INC.**
14 **DBA UPAS PHARMACY**
3332 Third Avenue
15 San Diego, CA 92103

A C C U S A T I O N

16 **Pharmacy Permit No. PHY 36112**

17 **BRIAN WILLIAM McKILLIP, RPH**
3541 Ingraham Street
18 San Diego, CA 92109

19 **Pharmacist License No. RPH 32896**

20 Respondent.

21 Complainant alleges:

22 **PARTIES**

23 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
24 as the Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs.

25 2. On or about January 26, 1990, the Board issued Pharmacy Permit Number PHY
26 36112 to Upas Pharmacy, Inc., doing business as Upas Pharmacy, with Brian William McKillip,
27 as owner and Pharmacist-In-Charge (Respondent Upas). The Pharmacy Permit was in full force
28

1 and effect at all times relevant to the charges brought herein and will expire on January 1, 2013,
2 unless renewed.

3 3. On or about August 9, 1979, the Board issued Pharmacist License Number RPH
4 32896 to Brian William McKillip (Respondent McKillip). In Case No. 2396, by Decision and
5 Order effective April 28, 2002, the license was revoked, the revocation stayed, and the license
6 placed on probation for a period of three years subject to certain terms and conditions.
7 Respondent successfully completed his probationary term, and his license was reinstated. In Case
8 No. 3423, by Decision and Order effective June 22, 2011, the license was revoked again, the
9 revocation stayed, and the license placed on probation for a period of five years subject to certain
10 terms and conditions. The Pharmacist License was in full force and effect at all times relevant to
11 the charges brought herein, and will expire on October 31, 2012, unless renewed.

12 JURISDICTION

13 4. This Accusation is brought before the Board under the authority of the following
14 laws. All section references are to the Business and Professions Code (Code) unless otherwise
15 indicated.

16 5. Section 118, subdivision (b), of the Code provides that the suspension, expiration,
17 surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
18 disciplinary action during the period within which the license may be renewed, restored, reissued
19 or reinstated.

20 6. Section 4300 of the Code states:

21 "(a) Every license issued may be suspended or revoked.

22 "(b) The board shall discipline the holder of any license issued by the board, whose default
23 has been entered or whose case has been heard by the board and found guilty, by any of the
24 following methods:

25 "(1) Suspending judgment.

26 "(2) Placing him or her upon probation.

27 "(3) Suspending his or her right to practice for a period not exceeding one year.

28 "(4) Revoking his or her license.

"(5) Taking any other action in relation to disciplining him or her as the board in its discretion may deem proper.

• • • •

"(e) The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board shall have all the powers granted therein. The action shall be final, except that the propriety of the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil Procedure."

STATUTORY AUTHORITIES

7. Section 4022 of the Code states:

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in humans or animals, and includes the following:

"(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

"(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

"(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006."

8. Section 4059.5 of the Code states in relevant part:

“ . . .

“(d) Notwithstanding any other provision of law, a dangerous drug or dangerous device may be ordered by and provided to a manufacturer, physician, dentist, podiatrist, optometrist, veterinarian, naturopathic doctor pursuant to Section 3640.7, or laboratory, or a physical therapist acting within the scope of his or her license. A person or entity receiving delivery of a dangerous drug or dangerous device, or a duly authorized representative of the person or entity, shall sign for the receipt of the dangerous drug or dangerous device.”

///

1 9. Section 4104, subdivision (b) of the Code states:

2 “(b) Every pharmacy shall have written policies and procedures for addressing chemical,
3 mental, or physical impairment, as well as theft, diversion, or self-use of dangerous drugs, among
4 licensed individuals employed by or with the pharmacy.”

5 10. Section 4126.5 of the Code states in relevant part:

6 “(a) A pharmacy may furnish dangerous drugs only to the following:

7 “(1) A wholesaler owned or under common control by the wholesaler from whom the
8 dangerous drug was acquired.

9 “(2) The pharmaceutical manufacturer from whom the dangerous drug was acquired.

10 “(3) A licensed wholesaler acting as a reverse distributor.

11 “(4) Another pharmacy or wholesaler to alleviate a temporary shortage of a dangerous drug
12 that could result in the denial of health care. A pharmacy furnishing dangerous drugs pursuant to
13 this paragraph may only furnish a quantity sufficient to alleviate the temporary shortage.

14 “(5) A patient or to another pharmacy pursuant to a prescription or as otherwise authorized
15 by law.

16 “(6) A health care provider that is not a pharmacy but that is authorized to purchase
17 dangerous drugs.

18 “(7) To another pharmacy under common control.

19 “....”

20 11. Section 4163, subdivision (a) of the Code states:

21 “(a) A manufacturer, wholesaler, repackager, or pharmacy may not furnish a dangerous
22 drug or dangerous device to an unauthorized person.”

23 12. Section 4169 of the Code states in relevant part:

24 “(a) A person or entity may not do any of the following:

25 “(1) Purchase, trade, sell, or transfer dangerous drugs or dangerous devices at wholesale with
26 a person or entity that is not licensed with the board as a wholesaler or pharmacy.

27 “....”

28 ///

13. Section 4301 of the Code states:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the following:

• • • •

"(j) The violation of any of the statutes of this state, or any other state, or of the United States regulating controlled substances and dangerous drugs.

• • • • •

"(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency."

REGULATORY AUTHORITIES

14. California Code of Regulations, title 16, section 1715.6 states:

“The owner shall report to the Board within thirty (30) days of discovery of any loss of the controlled substances, including their amounts and strengths.”

COST RECOVERY

15. Section 125.3 of the Code states, in pertinent part, that the Board may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

DRUGS

16. Hydroquinone is a dangerous drug under Code section 4022, and is used for hyperpigmentation.

17. Tretinoin is a dangerous drug under Code section 4022, and is used for acne.

18. Kenalog, also known under the generic name triamcinolone, is a dangerous drug under Code section 4022, and is used for non-inflammatory skin disorders.

///

1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Respondent Upas - Unlawful Wholesaling of Drugs)**

3 19. Respondent Upas is subject to disciplinary action under Code section 4301,
4 subdivision (j) for selling or transferring dangerous drugs at wholesale to an unlicensed person in
5 violation of sections 4169, subdivision (a)(1), and 4126.5. The circumstances are as follows:

6 20. From about September 2009 to April 2010, while Respondent McKillip was acting as
7 pharmacist-in-charge, Respondent Upas furnished dangerous drugs without a prescription,
8 including hydroquinone, tretinoin and Kenalog, to an unlicensed individual, L.M., and delivered
9 the dangerous drugs to the personal residence of L.M., located in Bonita, California.

10 **SECOND CAUSE FOR DISCIPLINE**

11 **(Respondent Upas - Unlawful Drug Transfers)**

12 21. Respondent Upas is subject to disciplinary action under Code section 4301,
13 subdivision (j) for selling or transferring dangerous drugs to unlicensed persons in violation of
14 sections 4163, subdivision (a) and 4059.5, subdivision (d). The circumstances are set forth in
15 paragraph 20, which is incorporated here by this reference.

16 **THIRD CAUSE FOR DISCIPLINE**

17 **(Respondent Upas - Failure to Report Drug Loss)**

18 22. Respondent Upas is subject to disciplinary action under Code section 4301,
19 subdivision (o) for failing to timely report stolen controlled substances to the Board in violation
20 of California Code of Regulation, title 16, section 1715.6. The circumstances are as follows:

21 23. On or about January 18, 2011, while Respondent McKillip was acting as pharmacist-
22 in-charge, Respondent Upas was burglarized and controlled substances were reported stolen from
23 the pharmacy to law enforcement.

24 24. On or about May 23, 2011, during an inspection of the pharmacy, Respondent
25 McKillip, owner and pharmacist-in-charge of Respondent Upas, admitted that the loss was never
26 reported to the Board.

27 ///

28 ///

1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Respondent Upas – Failure to Have Written Policies and**
3 **Procedures on Licensed Employee Theft/Impairment)**

4 25. Respondent Upas is subject to disciplinary action under Code section 4301,
5 subdivision (j) for failing to have written policies and procedures addressing chemical, mental, or
6 physical impairment, as well as theft, diversion, or self-use of dangerous drugs among licensed
7 individuals employed by or with the pharmacy in violation of Code section 4104, subdivision (b).
8 The circumstances are as follows:

9 26. On May 23, 2011, while Respondent McKillip was acting as pharmacist-in-charge,
10 during an inspection of the pharmacy, there were no written policies and procedures on licensed
11 employee theft or impairment available for review.

12 **FIFTH CAUSE FOR DISCIPLINE**

13 **(Respondent McKillip - Unlawful Wholesaling of Drugs)**

14 27. Respondent McKillip is subject to disciplinary action under Code section 4301,
15 subdivision (j) for selling or transferring dangerous drugs at wholesale to an unlicensed person in
16 violation of sections 4169, subdivision (a)(1), and 4126.5. The circumstances are set forth in
17 paragraph 20 above, which is incorporated here by this reference.

18 **SIXTH CAUSE FOR DISCIPLINE**

19 **(Respondent McKillip - Unlawful Drug Transfers)**

20 28. Respondent McKillip is subject to disciplinary action under Code section 4301,
21 subdivision (j) for selling or transferring dangerous drugs to unlicensed persons in violation of
22 sections 4163, subdivision (a) and 4059.5, subdivision (d). The circumstances are set forth in
23 paragraph 20 above, which is incorporated here by this reference.

24 **SEVENTH CAUSE FOR DISCIPLINE**

25 **(Respondent McKillip – Failure to Report Drug Loss)**

26 29. Respondent McKillip is subject to disciplinary action under Code section 4301,
27 subdivision (o) for failing to timely report stolen controlled substances to the Board in violation
28

1 of California Code of Regulation, title 16, section 1715.6. The circumstances are set forth in
2 paragraphs 23 and 24 which are incorporated here by this reference.

3 **EIGHTH CAUSE FOR DISCIPLINE**

4 **(Respondent McKillip – Failure to Have Written Policies and**
5 **Procedures on Licensed Employee Theft/Impairment)**

6 30. Respondent McKillip is subject to disciplinary action under Code section 4301,
7 subdivision (j) for failing to have written policies and procedures addressing chemical, mental, or
8 physical impairment, as well as theft, diversion, or self-use of dangerous drugs among licensed
9 individuals employed by or with the pharmacy in violation of Code section 4104, subdivision (b).
10 The circumstances are set forth in paragraph 26 which is incorporated here by this reference.

11 **PRAYER**

12 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
13 and that following the hearing, the Board of Pharmacy issue a decision:

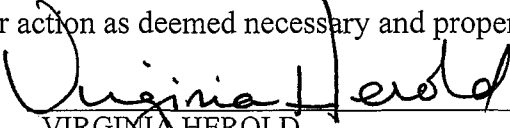
14 1. Revoking or suspending Pharmacy Permit Number PHY 36112 issued to Respondent
15 Upas Pharmacy with Brian William McKillip, owner and pharmacist-in-charge;

16 2. Revoking or suspending Pharmacist License Number RPH 32896 issued to
17 Respondent Brian William McKillip;

18 3. Ordering Upas Pharmacy and Brian William McKillip to pay the Board of Pharmacy
19 the reasonable costs of the investigation and enforcement of this case, pursuant to Business and
20 Professions Code section 125.3;

21 4. Taking such other and further action as deemed necessary and proper.

22 DATED: 6/13/12


VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

26 SD2011801418
27 70564233.doc
28